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No. 01-372

IN THE

Supreme Court of the United States

JAMES T. HANNON and RONALD J. TOWNSEND,
Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONERS' REPLY

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PETITIONER'S REPLY

Petitioners James T. Hannon and Ronald J. Townsend submit this reply to address decisions and matters that have arisen since the filing of their petition and briefly to address the government's opposition. The government suggests in its opposition that the task of reconciling the divergent precedents concerning the definition of a law enforcement officer should be left to the Federal Circuit. Yet only days after this petition was filed, the court below issued yet another inconsistent opinion on this issue. Far from providing concrete guidance and certainty, the court below has succeeded only in compounding the confusion. Review by this Court is thus all the more necessary.

ARGUMENT

1. In our petition we noted that the court below had issued three inconsistent decisions over the past four years struggling to apply Congress's straightforward definition of the

term "law enforcement officer." First, the court decided *Bingaman*,[1] in which it identified several extra-statutory factors that purportedly were germane to identifying those individuals performing law enforcement duties. Then, it decided *Hannon*,[2] in which it went out of its way to disavow genesis of the *Bingaman* factors, and added new factors, including one, hazard, that Congress repealed 25 years ago. Next, it issued *Watson*,[3] in which it recognized that the *Bingaman/Hannon* approach is not anchored in the statutory language and does not effectively distinguish between law enforcement officers and other employees. The *Watson* court thus spurned the individualized-inquiry approach used in *Bingaman* and *Hannon* in favor of a "position-oriented" approach. In so doing, it adopted five new criteria, but nonetheless concluded that the *Bingaman/Hannon* factors could be considered, "as necessary and appropriate."[4]

Since the filing of this petition, however, the court below has issued yet another inconsistent decision on this issue. In *Hall v. Department of the Treasury*,[5] decided only weeks after *Watson*, the court came full circle in its analysis. The Federal Circuit in *Hannon* was careful to distance itself from genesis of the *Bingaman* factors,[6] the *Watson* court recognized that the *Bingaman/Hannon* approach lacked statutory foundation and acknowledged that the *Bingaman* factors did not distinguish between law enforcement officer duties and other duties.[7] Yet in *Hall*, the court below concluded both that "the *Bingaman* considerations reflect . . . the language of

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[1] *Bingaman v. Department of the Treasury*, 127 F. 3d 1431 (Fed. Cir. 1997).

[2] *Hannon v. Department of Justice*, 234 F. 3d 674 (Fed. Cir. 2000).

[3] *Watson v. Department of the Navy*, 262 F. 3d 1292 (Fed. Cir. 2001).

[4] *Id.* at 1302.

[5] *Hall v. Department of the Treasury*, 264 F. 3d 1050 (Fed. Cir. 2001).

[6] Pet. App. A at 7a.

[7] *Watson*, 262 F. 3d at 1302.

the statute" and that "the *Bingaman* considerations are relevant to determining whether an employee is a law enforcement officer."[8]

Thus, in the space of two-and-one-half weeks, the court below has gone from recognizing that the *Bingaman* factors do not distinguish between law enforcement duties and other duties and adopting a "position-oriented" approach that "is more faithful to the language of the statutes and regulations"[9] to whole-heartedly endorsing the *Bingaman* factors as an expression of the statutory language and espousing an individualized-inquiry approach to determining law enforcement officer coverage. The law is in such great flux now that neither agencies, employees or adjudicatory bodies can know what factors need be considered in determining law enforcement coverage nor what evidence is necessary to establish entitlement. Review by this Court is necessary to resolve these conflicts and to provide certainty to a process that continues to be plagued by uncertainty.

2. Also since the filing of our petition, the petitioners in *Watson* have sought certiorari.[10] Thus, this Court now has before it challenges to two diametrically inconsistent opinions from the same court. There can be no dispute that one of these decisions, at least, is wrong and similarly there is no question about the significance of the issue to federal agencies and employees as well as administrative and judicial tribunals charged with adjudicating these claims. The Court may wish to consider this case and *Watson* together or it may wish to hold one case and grant plenary review in the other. But what this Court should not do is allow the confusion and uncertainty engendered by these conflicting decisions to continue unabated.

3. In its opposition, the government principally argues that

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[8] *Hall*, 264 F. 3d at 1056.

[9] *Watson*,262 F. 3d at 1297.

[10] Filed on November 15, 2001, the petition has not yet been docketed.

the decision below is correct. Certainly it would seem possible that one of the court's decisions, either *Bingaman*, *Hannon*, *Watson*, or *Hall*, is correct. But what is impossible is that they are all correct. Either the *Bingaman* factors "distinguish between law enforcement officer duties"[11] or they do not; either the proper inquiry (the one purportedly "more faithful to the language of the statutes and regulations"[12]) involves a "position-oriented"[13] approach or it does not. More fundamentally, either *Hannon*, which by necessary implication must be *less* faithful to the language of the statutes and regulations than *Watson*, is consistent with the statute or it is not. Regrettably, unless this Court grants plenary review, judges handling hundreds of pending cases will have to fend for themselves in the maze of uncertainty created by the court below and federal agencies and thousands of federal employees will have no clear guidance in resolving this recurring issue.

While the government argued that the decision below was correct, significantly, it did not suggest that it was unimportant. And, indeed, it is even more important today than it was when this petition was filed. Because of the recent attacks on our country, federal agencies are retasking their workforces to meet this evil. Many employees who traditionally are not granted law enforcement officer status, whether they be in the Immigration and Naturalization Service, the Customs Service, the Border Patrol, the Federal Aviation Administration, or in any number of other federal agencies, are finding that their duties are becoming "primarily the investigation, apprehension or detention of individuals suspected or convicted of offenses against the criminal laws of the United States."[14] Congress has man-

[11] *Watson*, 262 F. 3d at 1302.

[12] *Id.* at 1297.

[13] *Id.* at 1300.

[14] 5 U.S.C. §§ 8331(20); 8401(17).

dated that these employees be treated as law enforcement officers. Absent review by this Court, whether they will, is at best a guess.

4. In its Brief in Opposition, the government contends that Petitioner Hannon's primary argument here—that the Federal Circuit strayed from the plain language of the statute—was not properly raised below. Op. Cert. at 7. Not so. The first argument made by Hannon in his brief in the court below was that courts are bound by the plain language of the statutes they construe.[15] The argument that the *Hannon* panel identified as not timely presented was whether that court should overturn *Bingaman*,[16] a feat the panel was powerless to accomplish. But this argument was timely raised in petitioner Hannon's and Townsend's joint Petition for Rehearing and Suggestion for Rehearing *En Banc*.

In any event, as the government acknowledges,[17] no similar argument can be made with respect to Petitioner Townsend. Thus, the issue presented in this petition was squarely before the court below and is properly presented here.

CONCLUSION

For the foregoing reasons, and for those reasons stated in

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[15] *See e.g.*, Brief of Petitioner James T. Hannon at 18-21, *James T. Hannon v. Department of Justice*, No. 99-3354 (Fed. Cir. Nov. 19, 1999) (citing *Chevron, U.S.A.., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1987), and *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992), among other authorities, for the proposition that courts are bound to give effect to the unambiguously expressed intent of Congress).

[16] Reply Brief of Petitioner James T. Hannon at 13 and n. 2, *James T. Hannon v. Department of Justice*, No. 99-3354 (Fed. Cir. Nov. 19, 1999) ("To the extent that [*Bingaman*] imposes additional requirements . . . beyond those stated by Congress, [it is] erroneous and should be overruled.").

[17] Op. Cert. at 9.

our petition, the petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

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